In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 625

DORY AUERBACH, IRVING GOTTLIEB AND DAVID PROSSER RANDELL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. 17–21; R. 182) is reported at 347 F. 2d 742.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1965. A petition for rehearing en banc was denied on July 30, 1965 (Pet. 22; R. 204). On August 18, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including September 28, 1965, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

791-754—65

RULE INVOLVED

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> **Offense Committed in Two or More Districts or Divisions.** The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

QUESTION PRESENTED

Whether a district court's order, pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, transferring a criminal case back to the district of indictment from which it had previously been transferred, is a "final" order for purposes of appeal.

STATEMENT

A 22-count indictment filed on March 14, 1963, in the United States District Court for the District of Arizona charged petitioners with mail fraud in violation of 18 U.S.C. 1341 (R. 1–17; Pet. 27–36). The indictment alleged that petitioners were the officers of Lake Mead Rancheros, Inc., a Delaware corporation licensed to transact business and having a mailing address in Kingman, Arizona, but with principal offices in Florida. The scheme alleged was that petitioners fraudulently induced persons residing throughout the

United States to purchase certain range land in Mohave County, Arizona, by falsely representing that the land was located at ideally accessible sites and was fully developed and ready for "immediate living" with complete utility services. Each count of the indictment charged a separate mailing by a purchaser from a point in the United States to Kingman, Arizona. In a general description of the scheme it was alleged that the Arizona mailing address was used to lead the purchasers to believe that they were dealing with a company headquartered in Arizona when in fact the mail addressed to Kingman was not processed there "but forwarded to Lake Mead Rancheros, Inc., at Hollywood, Florida, or Miami, Florida" (R. 4; Pet. 30).

On August 16, 1963, petitioners moved pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure for an order transferring the cause to the United States District Court for the Southern District of Florida. They asserted, *inter alia*, that the indictment demonstrated that the acts charged took place in Florida, and that since all their defense and character witnesses were in the Miami area, it would be in the "interest of justice" to require transfer to that area (R. 29–54). After a hearing, District Judge Ling denied the motion (See Docket Entries; see also R. 163). Petitioners then filed a motion for rehearing and reconsideration of their motion to transfer (R. 86–90). The case was assigned to visiting Judge William C. Mathes (of California) sitting in the Arizona district. After a hearing (R. 139–179),

Judge Mathes granted the motion to transfer the case to the Southern District of Florida, Miami Division (R. 124, Pet. 23).

On February 26, 1965, Judge Charles B. Fulton, of the United States District Court for the Southern District of Florida, retransferred the case *sua sponte* to the United States District Court for the District of Arizona. The order of transfer recited that the indictment and a recently filed bill of particulars[1] had been carefully inspected, and that while the gist of the charge was the use of the United States mails, there was no allegation that material was either posted from or received in the Southern District of Florida. The order further noted that the allegation that the purported fraud involved forwarding material to Florida did not charge that the mails were used in the process, and for "these reasons" the cause was being retransferred (R. 132–133; Pet. 25).

The Court of Appeals for the Fifth Circuit (Judge Brown dissenting) dismissed an appeal from Judge Fulton's order to transfer on the ground that the order was not final and therefore not appealable.

ARGUMENT

Petitioners recognize that the requirement of finality as a condition for appellate review has been strictly

[1] Judge Mathes had ordered the government to file a bill of particulars stating wherein certain representations were claimed to be false and fraudulent (See R. 145–159; 128–131). At the same time he had denied a motion for a bill of particulars as to whether the offense occurred in more than one jurisdiction, noting that this was a question of law (R. 156–157).

applied in federal criminal law. As this Court said in *DiBella* v. *United States*, 369 U.S. 121, 126:

> Despite the se statutory exceptions to, and judicial construction of, the requirement of finality, "the final judgment rule is the dominant rule in federal appellate practice" 6 Moore, Federal Practice (2d ed. 1953), 113. Particularly is this true of criminal prosecutions. See, *e.g.*, *Parr* v. *United States*, 351 U.S. 513, 518–521. Every statutory exception is addressed either in terms or by necessary operation solely to civil actions. Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law.

The decision of the court of appeals in this case is consistent with decisions of other circuits holding orders transferring criminal proceedings to be non-final. See *Holdsworth* v. *United States*, 179 F. 2d 933 (C.A. 1); *United States* v. *Brown*, 301 F. 2d 664 (C.A. 4).[2]

To treat Judge Fulton's order as lacking in finality does not deprive petitioners of appellate review "in any court any time anywhere," as Judge Brown suggested in dissent (Pet. 18). For if Judge Fulton

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[2] In the earlier case of *United States* v. *National City Lines*, 334 U.S. 573 (involving the application of the doctrine of *forum non conveniens* to a civil antitrust proceeding), this Court, expressing doubt as to whether the government had a right to appeal from an order of transfer in a criminal case, observed that the "precise point apparently has not arisen since the adoption of Rule 21(b), but there would seem to be no statutory basis for appeal from an order of this type." 334 U.S. at 594, n. 43.

was without authority to retransfer the case to Arizona, petitioners are entitled to have any conviction obtained in the Arizona court reviewed on appeal. See *Parr* v. *United States*, 351 U.S. 513, 518–519. Petitioners must, it is true, proceed to trial in Arizona before they can have the validity of Judge Fulton's decision reviewed. But this inconvenience has been held to be "one of the painful obligations of citizenship" (*Cobbledick* v. *United States*, 309 U.S. 323, 325) which may lawfully be imposed in the interest of preventing disruptive piecemeal appeals in criminal proceedings. See *Parr* v. *United States*, *supra* at 519–520.[1]

Indeed, if Judge Fulton's order amounted to an erroneous exercise of power, petitioners might have sought review in the Fifth Circuit by way of petition for a writ of mandamus. See *United States* v. *Cashin*, 281 F. 2d 669 (C.A. 2); *United States* v. *Choate*, 276 F. 2d 724 (C.A. 5). See also *United States* v. *United States District Court for the Eastern District of Tennessee*, 209 F. 2d 575 (C.A. 6) (involving, as here, a transfer of proceedings and a subsequent retransfer); *United States* v. *United States District Court*, 334 U.S. 258; *Ex parte United States*, 287 U.S. 241. This Court, in *Platt* v. *Minnesota Mining and*

[1] *Brown Shoe Company* v. *United States*, 370 U.S. 294, involved an appeal in a civil antitrust action under the Expediting Act. Likewise, *Gillespie* v. *United States Steel Company*, 379 U.S. 148, involved a civil action in which the court of appeals had considered on the merits the validity of a district court's order to strike parts of a complaint. Neither of these decisions concerned transfer orders or involved the disruption and delay of criminal proceedings.

Manufacturing Company, 376 U.S. 240, assumed without deciding that a petition for writ of mandamus was an appropriate means to review the refusal of a district court to transfer a criminal antitrust proceeding under Rule 21(b).

Although Judge Fulton's ruling was patently based upon his conclusion that, as a matter of law, the offense of mail fraud was not committed in Florida and could not be tried there, petitioners have never attempted to review that decision by petition for mandamus.* Nor have they suggested to this Court or to the court of appeals that their appeal be treated as a petition for such an extraordinary writ. They now state the issue presented as simply "whether mandamus or appeal is the proper procedure to break a 'judicial stalemate' in criminal cases * * *" (Pet. 13), and this question is fully settled by decisions of courts of appeals which are not in conflict.

Finally, we submit that this case is inappropriate for further review by this Court since it is entirely clear from earlier decisions of the Fifth Circuit that if Judge Fulton's order were reviewed on its merits by that court it would be sustained. See *United States* v. *Choate*, 276 F. 2d 724 (C.A. 5); *Kreuter* v. *United States*, 218 F. 2d 532 (C.A. 5); see also *Hagner* v. *United States*, 285 U.S. 427; *United States* v. *Cashin*,

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* Present counsel, at a hearing before Judge Mathes in Arizona on July 27, 1964 (before the first order of transfer) advised that reconsideration of Judge Ling's denial of petitioners' request for transfer had been asked in the light of *Platt* v. *Minnesota Mining and Manufacturing Co.*, *supra*, specifically noting that in that case review had been sought by way of mandamus (R. 163).

281 F. 2d 669, 674 (C.A. 2). Consequently, even if the court of appeals had treated petitioners' appeal as a petition for a writ of mandamus it would have been required to deny the writ. Review by this Court of the jurisdictional question cannot, therefore, affect the ultimate site of the trial and can only serve to delay further a proceeding which is already more than two-and-a-half years old.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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